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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12

13 **THOMAS E. PEREZ,**
14 Secretary of Labor,
United States Department of Labor,

15 v.
16 Plaintiff,

17 **SUNKIST GROWERS, INC.**, a California
18 corporation;

19 **SUNKIST RETIREMENT PLAN A (PLAN
A)**, an employee pension benefit plan,

20 **SUNKIST RETIREMENT PLAN N (PLAN
N)**, an employee pension benefit plan,

21 **RETIREMENT PLAN FOR HOURLY
EMPLOYEES OF PRODUCTS GROUP,
SUNKIST GROWERS, INC. (HOURLY
PLAN)**, an employee pension benefit plan;

22 **DON DAMES, BILL CHANEY, RICHARD
FRENCH, RUSS HANLIN, NAZIR KHAN,
DICK NEECE, CHARLES WOLTMANN,
MICHAEL WOOTTON**, the individual
23 members of the PLAN BOARD OF SUNKIST
24 RETIREMENT PLAN, an employee pension
25 benefit plan fiduciary;

26) **Case No. CV 13-7116-PA (MRWx)**
27)
28)

29) **CONSENT JUDGMENT & ORDER**

**CLIFF BRADY, BARBARA RATCHFORD,
CHARLES WOLTMANN, DIANE
JOHNSON, CHRISTINE HAGEMANN, the
individual members of the
ADMINISTRATIVE COMMITTEE TO THE
HOURLY PLAN, an employee pension benefit
plan fiduciary;**

and

JOHN MCGOVERN, an individual.

Defendants.

Plaintiff THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor (the “Secretary”), pursuant to his authority under Sections 502(a)(2) and (5) of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1132(a)(2) and (5), has filed a Complaint against SUNKIST GROWERS, INC., a California corporation (“Company”); SUNKIST RETIREMENT PLAN A, an employee pension benefit plan (“Plan A”); SUNKIST RETIREMENT PLAN N, an employee pension benefit plan (“Plan N”); RETIREMENT PLAN FOR HOURLY EMPLOYEES OF PRODUCTS GROUP SUNKIST GROWERS, INC., an employee pension benefit plan (the “Hourly Plan”) (Plan A, N, and the Hourly Plan are collectively referred to as the “Plans”); DON DAMES, BILL CHANEY, RICHARD FRENCH, RUSS HANLIN, NAZIR KHAN, DICK NEECE, CHARLES WOLTMANN, MICHAEL WOOTTON, the individual members of the PLAN BOARD OF SUNKIST RETIREMENT PLAN, an employee pension benefit plan fiduciary (“Plan Board”) (the aforementioned individuals are collectively referred to as the “Individual Plan Board Members”); CLIFF BRADY, BARBARA RATCHFORD, CHARLES WOLTMANN, DIANE JOHNSON, CHRISTINE HAGEMANN, the individual members of the ADMINISTRATIVE COMMITTEE TO THE HOURLY PLAN, an employee pension benefit plan fiduciary (“Administrative Committee”) (the aforementioned individuals are collectively referred to as the “Individual Administrative Committee Members”); and JOHN MCGOVERN,

1 an individual (“McGovern”) (all aforementioned defendants collectively are referred to
2 as “Defendants”).¹

3 A. The Secretary, the Company, the Individual Plan Board Members, the Individual
4 Administrative Committee Members, McGovern, and the Plans (collectively, the
5 “Parties”) admit that the Court has jurisdiction over this action pursuant to ERISA
6 Section 502(e)(1), 29 U.S.C. § 1132(e)(1), and that venue lies in the district court
7 for the Central District of California pursuant to ERISA Section 502(e)(2), 29
8 U.S.C. § 1132(e)(2).

9 B. The Parties agree to the entry of this Consent Judgment and Order (“Consent
10 Judgment”). The Parties further agree that this Consent Judgment and Order shall
11 fully settle all claims of the Secretary asserted in the Complaint filed in this mat-
12 ter.

13 C. The Company, the Individual Plan Board Members, the Individual Administrative
14 Committee Members, McGovern, and the Plans acknowledge receipt of the Secre-
15 tary’s Complaint in this action and hereby waive service of process of the Sum-
16mons and Complaint.

17 D. The Parties expressly waive Findings of Fact and Conclusions of Law.

18

19 **IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:**

20 1. Defendants Company, Individual Plan Board Members, Individual Administra-
21 tive Committee Members, and McGovern are jointly and severally liable for
22 **\$1,620,419.78** in losses caused to the Plans as alleged in the Secretary’s Com-
23 plaint, and judgment is hereby entered against them in said amount.

24 2. On or before September 30, 2013, Defendants Company, Individual Plan
25 Board Members, Individual Administrative Committee Members, and McGov-

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28 ¹ The Plans are named as Defendants pursuant to Rule 19(a) of the Federal Rules of Civil
Procedure, solely to ensure that complete relief can be granted.

1 ern shall restore **\$1,620,419.78** in Plan losses and lost opportunity income to
2 the Plans in one lump sum payment (“Recovery Amount”). The Recovery
3 Amount shall consist of the following: **\$999,569.20** in losses to Plan A for
4 alleged prohibited reimbursements and overpayment of expenses; **\$314,546.31**
5 in corresponding lost opportunity income to Plan A; **\$117,753.45** in losses to
6 Plan N for alleged prohibited reimbursements and overpayment of expenses;
7 **\$37,628.65** in corresponding lost opportunity income to Plan N; **\$116,336.35**
8 in losses to the Hourly Plan for alleged prohibited reimbursements and over-
9 payment of expenses; and **\$34,585.82** in corresponding lost opportunity in-
10 come to the Hourly Plan.

- 11 3. Defendants Company, Individual Plan Board Members, Individual Administra-
12 tive Committee Members, and McGovern are permanently enjoined and re-
13 strained from violating the provisions of Title I of ERISA, 29 U.S.C.
14 §§ 1001-1191c.
- 15 4. Within ten (10) calendar days of payment of the Recovery Amount to the Plans
16 as referenced in Paragraph 2 supra, Defendants Company, Individual Plan
17 Board Members, Individual Administrative Committee Members, and McGov-
18 ern shall provide a copy of the front and back of the remittance check (or other
19 appropriate evidence that payment of the Recovery Amount has been made) to
20 the Regional Director of the United States Department of Labor, Employee
21 Benefits Security Administration (“EBSA”) (“Regional Director”), as specified
22 in Paragraph 6, infra.
- 23 5. Upon payment of the Recovery Amount by Defendants Company, Individual
24 Plan Board Members, Individual Administrative Committee Members, and
25 McGovern, said Defendants shall be assessed a penalty pursuant to ERISA
26 Section 502(l), 29 U.S.C. § 1132(l), in the amount of twenty (20) percent of the
27 applicable Recovery Amount, or **\$324,083.96** (“Penalty Amount”). Defen-
28 dants Company, Individual Plan Board Members, Individual Administrative

1 Committee Members, and McGovern waive the notice of assessment and ser-
2 vice requirement of 29 C.F.R. § 2570.83 and, within sixty (60) calendar days
3 following payment of the Recovery Amount as outlined in Paragraph 2, supra,
4 Defendants Company, Individual Plan Board Members, Individual Administra-
5 tive Committee Members, and McGovern shall pay the Penalty Amount to the
6 United States Department of Labor, by sending a certified or cashier's check
7 payable to the "United States Department of Labor" (please write "EBSA Case
8 Nos. 72-032957; -034084; -033781" on the memo line of the check) to:

9 U.S. Department of Labor
10 ERISA – Civil Penalty
11 P.O. Box 71360
12 Philadelphia, PA 19176-1360

13 6. Whenever a submission is required to be made to the Regional Director under
14 the terms of this Consent Judgment and Order, such submission shall be made
15 to:

16 Regional Director
17 U.S. Department of Labor
18 Employee Benefits Security Administration
19 1055 E. Colorado Blvd., Suite 200
20 Pasadena, CA 91106-2357
Telephone: (626) 229-1000
Facsimile: (626) 229-1098

21 7. In the event of default by Defendants Company, Individual Plan Board Mem-
22 bers, Individual Administrative Committee Members, and McGovern, the total
23 balance remaining unpaid shall then become due and payable within ten (10)
24 calendar days of the default, and interest shall be assessed against such remain-
25 ing unpaid balance at the rate provided by 28 U.S.C. § 1961 from the date this
26 Consent Judgment is entered until the total amount is paid in full.
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1 8. The Company, Individual Plan Board Members, Individual Administrative
2 Committee Members, and McGovern shall act with respect to the Plans, and to
3 any other ERISA-covered plan sponsored by the Company, in compliance with
4 ERISA, this Consent Judgment, and all regulations promulgated by the United
5 States Department of Labor, including but not limited to any regulations re-
6 garding the reimbursement of expenses from, or charging of expenses to, the
7 Plans.

8 9. The Company shall not provide services to any Plan without entering into a
9 written agreement, contract, or letter of understanding (regardless of form,
10 hereafter referred to as “Contract”) with that Plan. The Contract must be exe-
11 cuted by the Company and the responsible Plan fiduciaries on behalf of that
12 Plan, and reviewed and approved by an independent fiduciary (“Independent
13 Fiduciary”), as specified in Paragraph 14, infra. The Contract shall, at a mini-
14 mum, contain the following information:

15 a. A specification of services covered by the Contract;
16 b. The name of the entity (either the Company or the name of the subsidiary
17 thereof) that will be performing those services;
18 c. The expenses for which the Company will seek reimbursement when pro-
19 viding those services, expressed in a manner containing sufficient informa-
20 tion to enable the responsible Plan fiduciaries to evaluate the reasonable-
21 ness of the expense reimbursements;
22 d. A provision requiring that the Plan be given sixty (60) calendar days notice
23 of any material change in the nature of the services being provided;
24 e. A provision listing any third party expenses that will be billed directly to
25 the Plan and any third party expenses for which the Company will be reim-
26 bursed by the Plan; and
27 f. Any further information required by 29 C.F.R. § 2550.408b-2.

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1 10. Nothing in this Consent Judgment shall be construed as requiring that any
2 Plan or Plan fiduciaries agree to enter into a Contract with the Company for the
3 provision of services, or as relieving Plan fiduciaries from the obligation to de-
4 termine that such a Contract is prudent and otherwise consistent with ERISA.

5 11. In the course of providing services to the Plan, the Company shall not receive
6 funds from that Plan for providing services that are in excess of its direct ex-
7 penses, as that category of expenses is defined in 29 C.F.R. § 2550.408c-
8 2(b)(3). Nothing in this Consent Judgment shall relieve the Company of any
9 liability resulting from its charging an amount to a Plan in excess of its direct
10 expenses.

11 12. The Company may only be reimbursed from the Plans for expenses if: (a) the
12 expense is a direct expense, as that category is defined in 29 C.F.R.
13 § 2550.408c-2(b)(3); (b) the Company's records show that the expense was in-
14 curred solely for the benefit of the Plans; (c) the expense is necessary for the
15 establishment or operation of the Plans; (d) the expense is charged pursuant to
16 a contract or arrangement which is reasonable; (e) the expense is reasonable
17 and does not exceed the amount that would have been incurred by using third
18 parties at market rates; (f) the Independent Fiduciary, as specified in Paragraph
19 14, infra, has determined that it is prudent to use the Company as a service
20 provider with respect to the particular services for which reimbursement is
21 sought; (g) the expense does not exceed the actual costs incurred by the Com-
22 pany in rendering the service to each Plan; and (h) the expense is consistent
23 with ERISA and relevant regulations. Moreover, the Company shall not calcu-
24 late the reimbursement amount based upon a per-participant fee, percentage of
25 Plan assets, or any other method that does not track its actual costs.

26 13. Subject to the Independent Fiduciary's approval, as specified in Paragraph 14,
27 infra, the Company may receive reimbursements from a Plan for the salaries
28 and fringe benefits of those employees whose responsibilities consist solely of

1 performing work on behalf of one or more Plans (the “100% Plan Employ-
2 ees”), subject to the use of an approved allocation method for dividing those
3 reimbursements among the Plans (“Shared Expenses”). Shared Expenses shall
4 be allocated among the Plans based on a methodology established by the Inde-
5 pendent Fiduciary and approved by Plan fiduciaries for each applicable Plan.

6 14. Should the Company wish to seek reimbursement from the Plans for purported
7 direct expenses, the Company shall retain an independent fiduciary (“Inde-
8 pendent Fiduciary”), who is qualified by education, experience, and training
9 with a particular expertise in the fiduciary duties imposed by ERISA and em-
10 ployee benefit plan administration and management. Prior to retaining an In-
11 dependent Fiduciary, the Company shall first provide the Regional Director
12 with the name and credentials of the proposed Independent Fiduciary. The
13 Regional Director shall have thirty (30) calendar days from the date of receipt
14 of the name and credentials of the proposed Independent Fiduciary to provide a
15 written objection to the Company. The lack of an objection by the Regional
16 Director shall not relieve the Independent Fiduciary or the Company of their
17 fiduciary obligations under ERISA. The scope of the Independent Fiduciary’s
18 duties shall include:

- 19 a. Determining, as often as prudent and required by ERISA during his period
20 of service to the Plans, whether the use of the Company to provide adminis-
21 trative services to the Plan is prudent and reasonable in light of the quality
22 and cost of the services;
- 23 b. Approving administrative service agreements between the Company and
24 each Plan;
- 25 c. Approving invoices and any contemplated payments between the Company
26 and each Plan;

- d. Determining categories of direct expenses for which the Company may charge a Plan and the methods of calculating such direct expenses necessary to comply with the terms of this Consent Judgment (“Expense Methods”);
- e. Using prudent methods to monitor the Company’s compliance with the Expense Methods;
- f. If, in the course of performing his duties under this Consent Judgment, the Independent Fiduciary determines that the Company is not in compliance with the Consent Judgment, taking whatever action is necessary under ERISA to obtain the Company’s compliance.

15. The scope of the Independent Fiduciary’s duties, and this Consent Judgment, shall be construed to:

- a. apply to, and include, any assets of the Plans paid by the Plans to the Company that are determined under this Consent Judgment to be chargeable to a Plan, but
- b. not apply to, and exclude (i) any services provided by the Company to a Plan that are not paid or reimbursed by a Plan to the Company, including but not limited to any expenses incurred by the Company that are not charged to a Plan, or (ii) any expenses that are paid to the Company by a Plan in accordance with an approved individual exemption.

16. The Independent Fiduciary, as specified in Paragraph 14, supra, shall be entitled to reasonable compensation, fees and expenses, which amounts may not be paid from the assets of the Plans.

17. Should an Independent Fiduciary be retained, as specified in Paragraph 14, supra, the Company and Independent Fiduciary shall provide the Regional Director with status updates setting forth the Independent Fiduciary’s activities and findings with respect to the Plans and shall include, as applicable: (a) a list and description of all Expense Methods approved by the Independent Fiduciary; (b) a list of all payments made by each Plan to the Company or charged

1 directly to each Plan pursuant to this Consent Judgment, including the date on
2 which each payment was made; (c) documents, including but not limited to in-
3 voices, supporting the aforementioned payments (“Status Updates”). In the
4 event the Company and the Independent Fiduciary are unable to agree upon an
5 Expense Method or the application of an Expense Method, the Company and
6 Independent Fiduciary shall promptly notify the Regional Director.

7 18. The Company and Independent Fiduciary shall provide the Regional Director
8 with a Status Update within six (6) months of the Independent Fiduciary’s re-
9 tention. A further Status Update shall be provided to the Regional Director
10 within one (1) year of the Independent Fiduciary’s retention. Thereafter, the
11 Company and Independent Fiduciary shall make Status Updates available to
12 the Regional Director upon written request.

13 19. Upon review of the Status Update, as specified in Paragraphs 17 and 18, su-
14 pra, EBSA shall make best efforts to notify the Company and/or Independent
15 Fiduciary of potential noncompliance concerns before the due date of the fur-
16 ther Status Update. The Company shall respond as soon as administratively
17 practicable and, as appropriate, have an opportunity to correct any items identi-
18 fied by EBSA within a reasonable period of time. EBSA’s failure to notify the
19 Company and/or the Independent Fiduciary of any potential noncompliance
20 concerns shall not constitute, in any manner, a waiver of EBSA’s right to in-
21 vestigate or bring an enforcement action as a result of any party’s noncompli-
22 ance with this Consent Judgment or ERISA.

23 20. Defendants Company, Individual Plan Board Members, Individual Adminis-
24 trative Committee Members, and McGovern each expressly waive any and all
25 claims of any nature which they may have against the Secretary, the United
26 States Department of Labor, or any of its officers, agents, attorneys, employees
27 or representatives, arising out of, or in connection with, the allegations con-
28 tained in the Complaint on file in this action, any other proceedings or investi-

1 gation incident thereto, or based on the Equal Access to Justice Act, as amend-
2 ed.

3 21. The Secretary and all Defendants shall each bear their own costs, expenses,
4 and attorney's fees incurred to date in connection with any stage of this pro-
5 ceeding, including but not limited to attorney's fees which may be available
6 under the Equal Access to Justice Act, as amended.

7 22. Nothing in this Consent Judgment and Order is binding on any governmental
8 agency other than the United States Department of Labor, Employee Benefits
9 Security Administration.

10 23. This Court retains jurisdiction of this action for purposes of enforcing compli-
11 ance with the terms of this Consent Judgment and Order.

12 24. By signing their names to this Consent Judgment and Order, the Parties each
13 represent that they are informed and understand the effect and purpose of this
14 Consent Judgment and Order.

15 25. Any person signing this Consent Judgment and Order on behalf of a party ex-
16 pressly acknowledges and represents that he or she has the authority to sign
17 for, and legally bind, that party.

18 26. This Consent Judgment and Order may be executed in counterparts, each of
19 which shall be deemed to be an original, but all of which, taken together, shall
20 constitute one and the same instrument.

The Court directs the entry of this Consent Judgment and Order as a final order.
IT IS SO ORDERED.

Dated: October 18, 2013

United States District Judge

1 Entry of this Consent Judgment and Order is hereby consented to:

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3 Dated: September 30, 2013

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5 M. PATRICIA SMITH
6 Solicitor of Labor

7
8 JANET M. HEROLD
9 Regional Solicitor

10
11 DANIELLE L. JABERG
12 Counsel for ERISA

13
14 _____/s/ _____
15 GRACE A. KIM
16 Trial Attorney
17 Attorneys for Secretary of Labor

18
19 Dated: September 23, 2013

20
21 _____/s/ _____
22 For Sunkist Growers, Inc.

23
24 By: Charles L. Woltmann, Sr. VP., Law +
25 Gen'l Counsel
26 (Print name)

27
28 Dated: Sept. 23, 2013

29
30 _____/s/ _____
31 For Sunkist Retirement Plan A

32
33 By: Kellee Nelson, Plan Administrator
34 (Print name)

35
36 Dated: Sept. 23, 2013

37
38 _____/s/ _____
39 For Sunkist Retirement Plan N

40
41 By: Kellee Nelson, Plan Administrator
42 (Print name)

1 Dated: Sept. 23, 2013

____/s/ _____

2 For Retirement Plan for Hourly Employees
3 of Products Group, Sunkist Growers, Inc.

4

5 By: Kellee Nelson, Plan Administrator
6 (Print name)

7 Individual Plan Board Members:

8 Dated: 09/22/13

9 _____/s/ _____

10 Don Dames

11 Dated: 9-24-13

12 _____/s/ _____

13 Bill Chaney

14 Dated: 9-30-13

15 _____/s/ _____

16 Richard French

17 Dated: 9-23-13

18 _____/s/ _____

19 Russ Hanlin

20 Dated: Sept. 21st/ 2013

21 _____/s/ _____

22 Nazir Khan

23 Dated: 9/24/13

24 _____/s/ _____

25 Dick Neece

26 Dated: September 23, 2013

27 _____/s/ _____

28 Charles Woltmann

Dated: September 23, 2013

_____/s/ _____

Michael Wootton

1 Individual Administrative Committee Members:

2
3 Dated: 9/21/13 _____/s/ _____

4 Cliff Brady

5 Dated: 9/23/13 _____/s/ _____

6 Barbara Ratchford

7 Dated: September 23, 2013 _____/s/ _____

8 Charles Woltmann

9 Dated: 24 Sept. 2013 _____/s/ _____

10 Diane Johnson

11 Dated: 9/26/13 _____/s/ _____

12 Christine Hagemann

13 Dated: 9/30/13 _____/s/ _____

14 John McGovern

15 This Consent Judgment is approved as to form by:

16 Dated: 9/30/13 _____/s/ _____

17 Nicholas J. Waddles
18 Seyfarth Shaw, LLP
19 Attorney for Defendants